

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re application of: Baker

Atty. Docket No.: BBA-10002/29

Serial No.: 10/821,766

Group No.: 3676

Filed: April 9, 2004

Examiner: Mark A. Williams

For: ERGONOMIC HANDLES, ESPECIALLY FOR GARDEN TOOLS

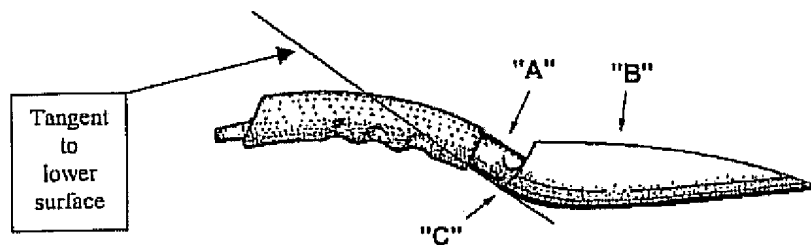
APPELLANT'S REPLY BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This reply brief is being submitted in response to new arguments raised by the Examiner in the Examiner's Answer mailed August 21, 2007.

On page 6 of the Examiner's Answer, in section 10 entitled "Response to Argument," the Examiner appears to retreat somewhat with respect to the assertion that the Jasperson reference meets the limitation of "a curved trowel blade having a lower surface tangent to a plane." Now the Examiner states that "[t]he line shown in the examiner's attached figure intersects a plane that would extend normal to the plane of the page, and would be tangent to *at least a part of the lower surface of the blade.*" In fact, *even from the Examiner's own drawing*, the line drawn by the Examiner appears to be tangent to a portion of *the handle*, and little, if any, of the surface of the blade, let alone the "lower surface." The Board's attention is directed to the figure below, which is a reproduction of the drawing made by the Examiner in page 6 of the Examiner's Answer.



It is Appellant's position that the line drawn by the Examiner is tangent to at least a portion *of the handle* "A" and not the blade. To the extent the line even touches the blade "B" it does so only at a point "C," and not at a surface. It is also important to note that Appellant's claim does not recite "a curved trowel blade having a plane tangent to a lower surface." Rather, the claim element reads "a curved trowel blade having a lower surface tangent to a plane." While this may seem like a minor distinction, it is not. Appellant's article *has* a lower surface tangent to a plane, as previously argued. Clearly the cited art of Jasperson does not have a lower surface tangent to a plane, at least it does not have a lower surface tangent to the plane drawn by the Examiner. Accordingly, *prima facie* obviousness has not been met.

It is further evident from the Examiner's Answer that the Examiner uses the knowledge or opinion of one skilled in the art in an inconsistent manner, only for the Examiner's purposes for rejection. On page 4 of the Examiner's Answer, the Examiner implies that to one of ordinary skill in the art, "Such modifications are not critical to this design and would have produced no unexpected results." However, as argued previously, the unexpected result is if that the rearward portion of the handle dips below a plane properly drawn tangent to the bottom surface of the blade, the user can hold the tool in a wrist neutral position as shown in Figures 2 and 3 of the instant specification, thereby delivering more directed power and avoiding physical ailments beyond mere "optimizing comfort."

While the Examiner argues on pages 6 and 7 of the Examiner's Answer that to one of skill in the art Appellant's configurations would be obvious, the Examiner further contends that Appellant is being unreasonable in suggesting that one skilled in the art would limit their interpretation of the device to only that interpretation provided by Appellant. However, given a trowel blade with a lower surface, it would not even require a person of ordinary skill in the art to draw a plane tangent to that lower surface, and not up on a portion of the handle such that the plane intersects the side of the blade at a point, if at all. As further evidence that the Examiner is resorting to the opinion of a skilled artisan on a selected basis, the Examiner raises the new intention on page 8 of the Answer that "In addition to comfort, one skilled in the art would also know that such dimensions could be selected for visual appeal." This has no foundation or basis in fact, and is therefore without support.

Finally, on page 9 of the Examiner's Answer, the Examiner raises the new argument that Appellant has not argued the Examiner's use of "Official Notice" in prior Office Actions. This is

simply untrue. The Examiner took Official Notice with respect to claim 30, and on page 8 of Appellant's corrected brief, this position is addressed, leading to the conclusion that *prima facie* obviousness has not been established.

Respectfully submitted,

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